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Supreme Court of the United States

OCTOBER TERM, 1950

No. ~~87~~ 77

MONTANA-DAKOTA UTILITIES CO.,
a corporation,

Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a corporation,

Respondent.

ETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

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INDEX.

	PAGE
PETITION	1
Jurisdiction	1
Statement	2
The Statutes	7
Questions Presented	13
Specification of Errors	14
Reasons for Granting the Writ	15
SUPPORTING BRIEF	21
Opinions Below	21
Statement	21
Analysis of the Power Act	22
The Petitioner Had No Interest in Bypassing the Commission on the Issue as to Reasonableness of Past Rates	28
APPENDIX	33
<i>Cleveland and Akron v. Hope Natural Gas Co.,</i> 44 Pub. Utilities Rep. (New Series) pp. 34-35..	33

CITATIONS:

Cases:

<i>Civil Aeronautics Board v. Modern Air Transport,</i> 179 F. (2d) 622	26
<i>Cleveland and Akron v. Hope Natural Gas Co.,</i> 44 P. U. R. (N. S.) 1, 33	6, 17, 33
<i>Federal Power Commission v. Hope Natural Gas Co.,</i> 320 U. S. 591	6, 18
<i>Great Northern Railway v. Merchants Elevator Co.,</i> 259 U. S. 285	30
<i>Hope Natural Gas Co. v. Federal Power Commission,</i> 134 F. (2d) 287	6, 11, 15, 17, 19, 28

	PAGE
<i>Mississippi Power and Light Co. v. Memphis Natural Gas Co.</i> , 162 F. (2d) 388	6, 28, 29
<i>Shields v. Utah Idaho Railway</i> , 305 U. S. 177	24
<i>Steele v. L. & N. Railroad</i> , 323 U. S. 192	26
<i>Texas & Pacific Railway Co. v. Rigsby</i> , 241 U. S. 33	31
<i>United States v. Interstate Commerce Commission</i> , 337 U. S. 427	24
 <i>Statutes:</i>	
Federal Power Act, Aug. 26, 1935, c. 687, § 213, 49	
Stat. 863; 16 U. S. C. A.:	
Sec. 824, subchapter II (b)	7
824d	7
824d(a)	7
(b)	8
(c)	8
(d)	8
(e)	9
824e	10
824e(a)	10
824e(b)	11
825p	12
Natural Gas Act of June 21, 1938, 52 Stat. 821	
(15 U. S. Code, Chap. 15B):	
Sec. 717d(b)	17
717m(a)	25
717o	25
 <i>United States Code, Title 28:</i>	
Section 41 (Judicial Code, Sec. 24) (now Title 28 United States Code, Sections 1331, 1337)	12
Section 1254	1

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause (VI, * 1996).

JURISDICTION.

The judgment of the Court of Appeals was entered April 4, 1950.

Jurisdiction to issue the writ rests on Title 28, United States Code, Sec. 1254. See also Sec. 825p of

* Roman numerals in parenthesis indicate Record volume.

the Power Act, which gives United States District Courts "exclusive" jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by * * * this chapter," and makes the judgments of the District Courts reviewable by appeal to the Courts of Appeals, and by this Court on certiorari to the Courts of Appeals.

STATEMENT.

This case arises under that part of the Power Act effective August 26, 1935, which gave to the Federal Power Commission authority over the transmission in interstate commerce and the sale at wholesale of electric energy. It involves questions as to the extent of the authority of the Commission to deal with the reasonableness of past rates and charges. The Commission's exclusive authority to fix rates and charges for the future is clear, and as that is a legislative function it cannot be exercised by any court, but Congress deliberately withheld from the Commission the power to grant reparations for past exactions. In that respect the Power Act is unlike the Interstate Commerce Act. The question is whether the Commission has authority to examine and make findings as to the reasonableness of past rates and charges as a basis for recovering in the United States District Court excessive and unreasonably high charges collected or unreasonably low payments made in the past, and whether resort to the Commission to find the facts must be had before resort to the courts.

The action was begun February 3, 1947 (I, 1) in the United States District Court for the District of South Dakota by petitioner as plaintiff, to recover for alleged overcharges by the defendant for services

rendered by it to some corporations to whose rights plaintiff succeeded October 19, 1945, and for underpayments by defendant to the plaintiff's predecessors for electric power transmitted by plaintiff's predecessor corporations and sold to defendant at wholesale for the period from September 1, 1935, to October 19, 1945. The complaint with amendments (I, 1-105, 173-186; V, 1879-1883, 1967-1978) alleged that the rates and charges complained of were unreasonable and therefore unlawful under Sec. 824d(a) of the Power Act, which provides:

"Sec. 824d Rates and charges; schedules; suspension of new rates.—(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Involving, as the plaintiff's claim did, the reasonableness of charges for a past period, the defendant moved (I, 106) in the District Court to dismiss the case for want of "jurisdiction" asserting that the Power Commission has not only "primary" but exclusive jurisdiction to pass on the question of reasonableness of rates and consequently the District Court could not entertain an action which required it to determine the reasonableness of past rates; and that the plaintiff had not first exhausted its administrative remedies by applying to the Power Commission for relief (III, 995).

The District Court refused to dismiss (I, 112) hold-

ing that Congress had not given any power to the Commission to determine the reasonableness of past rates or grant reparations, but only to fix future rates and that the Power Act did not divest the District Courts of their jurisdiction granted by Title 28, Sec. 41, U. S. C. (now United States Code, Secs. 1331, 1337), over cases arising under laws of the United States. It then proceeded to trial on the merits without a jury, made findings (V, 1930-1965) and entered judgment for the principal sum of \$556,120.76, together with interest to date of trial, making a total of \$779,958.30 (V, 1965).

As the transactions between the corporations were at wholesale and required physical connections between their lines for interchange of electric energy, the rates and charges involved were fixed in contracts between them and did not affect other persons or corporations, and after the Power Act took effect August 26, 1935, the parties adopted the practice of filing these contracts with the Commission to disclose the rates and charges. The case is peculiar in that it involves not only unreasonably high charges by defendant for services it rendered, but unreasonably low rates paid by defendant for electric energy delivered to defendant. Although the contracts provided for the same price per kilowatt for electric energy whichever way it flowed, the amount of energy delivered to defendant was larger than what flowed the other way, and the largest item of recovery in the case was because of that.

On appeal by the defendant the Court of Appeals, without passing on the merits, held that the Power Act gave to the Commission primary and exclusive jurisdiction over the question of reasonableness of the rates, both past and future, and also that the plaintiff had not exhausted its administrative remedies

by applying to the Commission for relief, and reversed the judgment and ordered the District Court to dismiss the case.

It was charged in the complaint, and the District Court found, that the petitioner's predecessor corporations (to whose rights the plaintiff succeeded on October 19, 1945) (I, 12) had been dominated by officers and a board of directors who were also the officers and directors of the defendant during the period from 1935 to October 1945, and it was by means of that domination that plaintiff's predecessors in interest had been overreached by the defendant and subjected to unreasonable rates and charges. That domination had also the effect of preventing those predecessors from taking any steps for relief before the Commission or otherwise until the acquisition by petitioner in October 1945 of the assets of the predecessors vested the claims asserted in the complaint in a free agent with a new management and an independent board of directors, in a position to resort to either the Commission or the courts for such relief as either could grant.

The petitioner on August 12, 1946, filed a complaint with the Commission charging the existing rates to be unreasonable and asked for new rates *for the future* (I, 149). The complaint never came to a hearing because new schedules acceptable to the plaintiff were filed and the Commission then dismissed the complaint as moot (V, 1876) saying:

“(e) By the terms of the agreement filed August 20, 1947, the issues involved in the complaint, as amended, have become merely moot and the public interest will be served by dismissing the same.”

The petitioner did not then or since ask the Commission for any relief or action as to the unreasonable rates and charges in force from 1935 to 1945. The Commission had already conceded it had no power to grant reparations. *Mississippi Power and Light Co. v. Memphis Natural Gas Co.*, 162 F. (2d) 388, 389; *Cleveland and Akron v. Hope Natural Gas Co.*, 44 P. U. R. (N. S.) 1, 33; *Hope Natural Gas Co. v. Federal Power Commission*, 134 F. (2d) 287, 310-311 (1943) s. c. 320 U. S. 591, 618, January 3, 1944.

In the *Memphis* case the Commission had also held it was without authority to make findings as to past rates for use in an action to recover reparations pending in a District Court.

In the *Hope* case this Court said (p. 618) :

“It is conceded that under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those ‘to be thereafter observed and in force.’ § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. However that may be, we do not think that these findings were reviewable under § 19 (b) of the Act.” That section provided for review by a Court of Appeals of “orders”.

The United States Court of Appeals for the Fourth Circuit had held in *Hope Natural Gas Co. v. Federal Power Commission*, 134 F. (2d) 287, that under the Natural Gas Act, which is substantially identical with subchapter II of the Power Act in the respects here pertinent (see Section 717c, 717d, Natural Gas Act,

15 U. S. Code, Chapter 15B) the Power Commission not only had no authority to grant reparation orders, but had no authority to examine into the reasonableness of past rates or make findings on that question. The obvious course for the petitioner was to resort to the United States District Court which under Section 825p is given "exclusive" jurisdiction (thus eliminating resort to state courts) of all controversies under the Power Act, excepting review of "orders" which are taken directly to the United States Court of Appeals for review [Section 825l (b)].

THE STATUTES.

The pertinent part of the Federal Power Act is subchapter II which became effective August 26, 1935 (16 U. S. C. A. § 824, *et seq.*). Section 824 (b) is as follows:

"The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy" etc.

Section 824 (d) reads:

"The term 'sale of electric energy at wholesale' when used in sections 824-824h of this title means a sale of electric energy to any person for resale."

Section 824d is as follows:

"*Sec. 824d Rates and charges; schedules; suspension of new rates.*—(a) All rates and charges made, demanded, or received by any public utility

for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges *shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.*

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall

be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change

of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision *may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.* At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, § 213, 49 Stat. 851.)"

Section 824e is as follows:

Sec. 824e Power of Commission to fix rates and charges; determination of cost of production or transmission.—(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or

classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, § 213, 49 Stat. 852.)" [All italics supplied.]

It should be noted that when the bill for subchapter II of the Power Act was pending in the Congress it contained provisions (similar to those in the Acts applicable to the Interstate Commerce Commission) authorizing the Power Commission to consider the reasonableness of past rates and to make reparation orders. Those provisions were stricken out in committee. See *Hope Natural Gas Co. v. Federal Power Commission*, 134 F. (2d) 287, at page 310, where the Court said:

"It is to be noted that in the passage of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. § 79 *et seq.*, upon which the Natural Gas Act is modeled, provisions giving the Commission power to investigate single rates and is-

sue reparation orders, originally incorporated in the bill, were stricken out, the Senate Committee saying in its report: 'They are appropriate sections for a state utility law, but the committee does not consider them applicable to one governing merely wholesale transactions'. The Commission may not by administrative interpretation of the act thus clothe itself with a power denied it by Congress."

Title 28, § 41, U. S. C. (now Title 28 United States Code Sections 1331, 1337), defining the jurisdiction of the United States District Courts, provided:

"The district courts shall have original jurisdiction as follows: * * *

First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, * * *.

* * * *

Eighth. Of all suits and proceedings arising under any law regulating commerce."

Section 825p of the Power Act is as follows:

"Sec. 825p Jurisdiction of offenses; enforcement of liabilities and duties.—The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in

equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. (June 10, 1920, c. 285, § 317, as added Aug. 26, 1935, c. 687, § 213, 49 Stat. 862.)"

This section seems to confirm jurisdiction of cases like this to the United States District Courts, to the exclusion of state courts, leaving Commission orders to be taken direct to the Courts of Appeals for review.

QUESTIONS PRESENTED.

1. Has the Federal Power Commission primary jurisdiction, or indeed any jurisdiction, to consider and determine the reasonableness of rates exacted and collected in the past, or to do more than exercise the legislative power to fix rates for the future?
2. Had the plaintiff any administrative remedy before the Commission? Has the Commission any

authority to consider a complaint as to the unreasonableness of past rates, or grant reparations, or even to make any findings as to past rates, as an aid to the courts before which a claim for reparations is made?

3. Conceding that Sec. 824d(e) of the Power Act does give an administrative remedy to a corporation which is a free agent to attack unreasonable rates and prevent their becoming effective if its complaint is filed before the rates take effect, do not facts alleged and found by the District Court—viz., that the plaintiff's predecessors were helpless because of the domination over them by the defendant as a result of which the preventive remedy under 824d(e) was lost—have the effect of relieving the plaintiff of the application of the rule requiring exhaustion of administrative remedies?

SPECIFICATION OF ERRORS.

The Court below erred:

1. In holding that the District Court was without jurisdiction;
2. In holding that the Power Act gives jurisdiction to the Power Commission to determine the reasonableness of past rates and charges and denies to the District Court jurisdiction to entertain this action, in which a determination of the reasonableness of past rates is necessary to the granting of relief;
3. In applying to the facts of this case the rule that judicial relief may not be obtained until the prescribed administrative remedies have been exhausted;

4. In holding that any administrative remedy was available to the petitioner, and in ignoring the findings of the Trial Court that the petitioner's predecessors were from 1935 to 1945 under the domination of the defendant and therefore unable to resort to the Commission before the rates became effective, to prevent their taking effect;

5. In holding, in effect, that the petitioner can have no relief in any tribunal since the Commission may only exercise the legislative power to fix future rates, and the courts are without jurisdiction because they are forbidden by the Power Act to consider or determine the reasonableness of past rates although that is a judicial question.

REASONS FOR GRANTING THE WRIT.

1. There is a conflict between the decision of the United States Court of Appeals for the Eighth Circuit in this case and the decision of the United States Court of Appeals for the Fourth Circuit in *Hope Natural Gas Co. v. Federal Power Commission*, 134 F. (2d) 287, decided February 16, 1943.

The *Hope* case arose under the Natural Gas Act (15 U. S. Code, Chapter 15B; Act of June 21, 1938, 52 Stat. 821, as amended), but that statute relating to natural gas and the Power Act relating to electric energy are identical in the respects pertinent here. Secs. 717c and 717d of the Gas Act are identical with Secs. 824d and 824e of the Power Act, except that one deals with the sale of natural gas at wholesale, and the other with sales of electric energy at wholesale. Thus decisions under the Natural Gas Act on the questions presented here as to powers of the

Commission are authorities on the interpretation of the Power Act.

In the *Hope* case in the Fourth Circuit the Power Commission, on complaint filed *after* the rates in question had taken effect, entered an order May 26, 1942, fixing *future* rates effective July 1, 1942, for sales of gas at wholesale by Hope to East Ohio Gas Company, but at the same time it made findings that the past wholesale rates charged by Hope to East Ohio Gas Company since June 30, 1939, had been unreasonable and found what would have been reasonable rates for the past period. The Commission had said, "The Commission does not have the authority to fix rates for the past and to award *réparations*" but asserted authority to make findings as to past rates "as an aid to state regulation," it appearing that the Ohio State Commission was considering the reasonableness of the retail rates being charged by the East Ohio Gas Company, a wholesale buyer from Hope.

Sec. 717d(b) of the Gas Act (identical with Sec. 824e(b) of the Power Act) which is the only provision in either Act giving the Power Commission authority to make findings "in aid" of any other agency or tribunal is as follows:

"(b) The Commission upon its own motion, or upon the request of any State Commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. (June 21, 1938, c. 556, § 5, 52 Stat. 823.)"

That section limits the Commission "in aid" of a state commission to ascertaining "cost of production or transportation" which are only two of the pertinent factors in determining the reasonableness of rates.

The Fourth Circuit Court held (134 F. (2d) 287, pp. 309-311) that the Commission lacked authority to make findings as to the reasonableness of past rates. It said:

"The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i. e. regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act."

For the convenience of this Court the pertinent portions of the Power Commission's opinion in the *Hope* case are quoted in the appendix to this petition (*Cleveland and Akron v. Hope Natural Gas Co.*, 44 P. U. R. (N. S.) pp. 33-34).

It will be observed that the arguments of the Commission based on general provisions of the Natural Gas Act (Sec. 14a and Sec. 16) rejected by the Fourth Circuit are accepted by the Eighth Circuit in the present case in respect of like provisions of the Power Act. The *Hope* case reached this Court (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, decided January 4, 1944) and was reversed on other grounds, but as to findings of the Commission

"in aid" of the Ohio Commission this Court said (pp. 618-619) :

"Findings as to the Lawfulness of Past Rates. As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. However that may be, we do not think that these findings were reviewable under § 19 (b) of the Act. That section gives any party 'aggrieved by an order' of the Commission a review 'of such order' in the circuit court of appeals for the circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp. v. United States*, 307 U. S. 125. It was there pointed out that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights ad-

versely on the contingency of future administrative action,' it is not reviewable. *Id.*, p. 130. The Court said, 'In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.' *Id.*, p. 130. And see *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309, 310; *Shannahan v. United States*, 303 U. S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are 'the exercise solely of the function of investigation.' *United States v. Los Angeles & Salt Lake R. Co., supra*, p. 310. They are only a preliminary, interim step towards possible future action—action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action."

2. The Court below has decided an important question of federal law which has not been but should be settled by this Court. When this action was begun, the admission by the Power Commission that it had no authority to make reparation orders and the opinion of the Fourth Circuit in the *Hope* case that the Commission's authority was limited to the legislative function of fixing future rates and could not make findings as to the reasonableness of past rates, and the refusal of the Commission in 1945 in *Mississippi Power and Light Co. v. Memphis Natural Gas Co.*, *supra*, to make findings as to the reasonableness of past rates, to aid a District Court in a pending action for recovery of unreasonable charges (one of

the grounds assigned for refusal being its lack of power), pointed to the District Court as the only tribunal which could give the relief sought. After following that course, petitioner is now confronted with the Eighth Circuit decision that it took the wrong route. Although cases of this sort may not be frequent, litigants ought not to be left in a position to fall between two stools, and the law should be settled.

Respectfully submitted,

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SUPPORTING BRIEF.

Opinions Below.

The opinion of the Court of Appeals (VI, 1987) has not been reported.

The oral opinion of the District Court (V, 1883) is not reported. Its findings are in V, 1930.

Statement.

No question of the merits is before this Court, but only the question of jurisdiction of the District Court, or to put it in another way the questions here are whether the Power Act divests the District Court of any power to consider or make findings as to the reasonableness of past rates, and whether the case is one for application of the rule that judicial relief will not be allowed until the plaintiff has exhausted his administrative powers.

The question is not whether the Power Act grants to the District Court jurisdiction, but whether it takes away or limits jurisdiction. The complaint charged and the Trial Court found that the rates charged were unreasonable and a violation of Section 824d of the Power Act, which provides that all unreasonable rates and charges are unlawful. That is a claim arising under the laws of the United States of which the District Court had original jurisdiction by virtue of what was, prior to September 1, 1948, Title 28, § 41(1) United States Code, and is now Title 28 United States Code, Section 1331, unless the Power

Act withdrew it. Section 825p of the Power Act (p. 12 of the petition) confirmed that jurisdiction, but went further and gave the District Courts "exclusive" jurisdiction of controversies under the Power Act, thus eliminating state courts.

For the purposes of this petition this Court has to assume that the evidence established and the District Court was justified in finding that the rates from 1935 to 1945 were unreasonable, and also that the petitioner's predecessor corporations were under the complete domination of the defendant, and that it was by means of that domination that there was no opportunity to apply to the Commission under Section 824d(e) of the Power Act for preventive relief to prevent the unreasonable rates from going into effect. For the same reason there was no opportunity to apply to the Commission to alter the rates for the future, until after October 19, 1945, when the petitioner acquired its predecessors and a new management was installed.

The evidence about corporate domination not only bears on the questions of constructive fraud and reasonableness of charges, and the burden of proof on that point, but also established a complete excuse to the aggrieved corporations for not applying to the Commission for relief before the rates and charges became effective.

Analysis of the Power Act.

Section 824d, subdivision (e), states that whenever any new schedule is filed then upon complaint or on its own motion the Commission may investigate the reasonableness of the proposed rates, and may stay their effectiveness for not more than five months. If the

proceeding has not been concluded and an order made at the expiration of said five months, the rates shall go into effect, but the Commission's order, if it finds the proposed rates too high, may require a refund for the period back to the date the rates took effect.

That section obviously relates to complaints filed *before* the proposed rates take effect, and in such cases allows a reparation order to a limited extent.

Section 824e relates to the power of the Commission on complaint filed *after* the rate takes effect, and in such case the Commission is limited to the determination of

"the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force."

In this connection it should be noted that the provisions in the original bill to consider rates and charges collected in the past and make findings as a basis for reparation were stricken from the bill by the Senate Committee on Interstate Commerce.

There is no other provision in the Power Act which supports the view that the Commission may deal with past rates and charges. There is none which authorizes the Commission to examine into the reasonableness of past charges and make findings to bind or in order to aid a District Court when granting recovery for past unreasonable charges.

It thus appears that the Power Act limits the authority of the Commission, first, to preventing unreasonable rates from taking effect where complaint is made before they take effect; or, second, to fixing new rates for the future where the rates are assailed after they take effect.

In its opinion in the *Hope* case the Power Commission, claiming the power to make findings as to the reasonableness of past charges, said:

"The Interstate Commerce Commission has furnished precedents for the performance of this public duty."

The Interstate Commerce Commission has not only express power to examine past charges and order reparations, but it has expressly been given authority to make findings as an aid to other agencies. Even the Mediation Board under the Railway Labor Act may apply to and obtain from the Interstate Commerce Commission findings for use in a labor dispute. *Shields v. Utah Idaho Railway*, 305 U. S. 177. See also *United States v. Interstate Commerce Commission*, 337 U. S. 427, pp. 464-6, as to staying action in the District Court to await findings by the Interstate Commerce Commission.

There is no provision in the Power Act (or the Gas Act) which even suggests that a person aggrieved by the imposition in the past of unreasonable charges may apply to the Commission for findings before bringing action in the District Court, or after action is begun may apply to the Commission for findings while the action is meanwhile stayed by the Court.

Section 824e(b) of the Power Act states that the Power Commission, on request of a state commission, and if not too busy, may determine the cost of production or transmission of electric energy in cases where the Power Commission has no authority to establish a rate, but a person subjected to an unreasonable rate has no right to make such an application, and the findings to be made are as to only one factor affecting the reasonableness of rates, and as to the present cost

of production as an aid to the state commission fixing future retail rates.

The Court below quotes Section 825f of the Power Act, and Section 825h—one giving investigative power, and the other giving it power to make, amend and rescind orders—as authority for its conclusion that jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past, is vested not in the District Court but in the Commission.

Those sections of the Power Act are identical with Section 717m(a) (§ 14, ch. 556, Act of June 21, 1938), and Section 717o (§ 116, ch. 556, Act of June 21, 1938) of the Natural Gas Act, and which were relied on by the Commission in the *Hope* case to support its claim to authority equal to that of the Interstate Commerce Commission, and which the Court of Appeals of the Fourth Circuit in the *Hope* case carefully analyzed and rejected as a basis for any authority of the Power Commission to make findings as to past rates.

If the Power Commission lacks authority to investigate and make findings on the reasonableness of past rates as a basis for reparation orders, the conclusion of the Court below that it may do so, if the imposition of unreasonable rates was achieved by fraud, seems to be without basis.

The fraud question is not one with which a Commission is especially equipped to deal.

The opinion of the Court below is not very informative. Its general conclusion was that the Commission has exclusive jurisdiction to pass on the reasonableness of rates, past as well as future, and an action to recover damages for unreasonable past charges cannot be maintained or even begun until the Commission has exercised that function. It fails to point out spe-

cifically a provision of the statute which is to be followed, or anything in the statute as to the effect of the findings or as to whether the complaint to the Commission may be made after action is begun in court, or must be made before action, with assurance to the Commission that complainant intends to sue.

As to "exhausting" administrative remedies, the opinion fails to state just what administrative remedy the petitioner had or how to proceed to obtain it after October 19, 1945. It does not discuss the question as to the preventive remedy under Section 824d by complaint to the Commission before rates become effective, nor does it mention the question whether the domination by defendant excused the injured corporations from proceeding under 824d.

In *Civil Aeronautics Board v. Modern Air Transport*, 179 F. (2d) 622, it was said that the rule requiring exhaustion of administrative remedies "serves only to prevent private litigants from attempting to oust administrative bodies from the exercise of adjudication properly committed to them." If there is no administrative remedy, resort may be had to the courts. *Steele v. L. & N. Railroad*, 323 U. S. 192.

The opinion below also states that the rates charged and paid were "approved for filing" by the Commission. The record shows that the Commission never approved anything. It has never to this day considered or examined into the question of reasonableness of any rate here involved. It did not even do that when petitioner applied to it to alter rates for the future, because the defendant consented to new rates with which the petitioner was satisfied. The statute does not require any approval by the Commission for the filing of rate schedules. The Commission made some

orders purporting to give a retroactive effect to contracts, the filing of which had been delayed. In one of those orders it said:

"Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein" (I, 111).

In the Court below the petitioner was confronted with an argument by the Commission (*amicus*) that under the law the petitioner was conclusively bound by the filed rates, and could not attack them or question their reasonableness. Many cases were cited arising under the Interstate Commerce Act and other regulatory statutes that where a rate schedule has been duly filed and has taken effect, the utility must collect and the shipper or customer must pay the scheduled rates. That is to prevent discrimination and rebating. Those cases do not hold that such rates are conclusively reasonable and unimpeachable, but merely that they must be collected and paid in the first instance, subject to correction or reparation by the tribunals having jurisdiction of such claims. The Power Commission itself said in the *Hope* case, 44 P. U. R. (N. S.) 33:

"The acceptance of a rate for filing does not mean that the Commission approves it and does not establish the justness or reasonableness of the rate. *Re Home Gas Co.*, 39 P. U. R. (N. S.) 102, 109."

Section 824d(a) of the Power Act states that all rates and charges "made, demanded or received" shall be reasonable and "any such rate or charge

that is not just and reasonable is hereby declared to be unlawful." That applies to rates filed. The filed rate must be collected and paid in the first instance, but is subject to impeachment by proceeding brought for that purpose.

The Petitioner Had No Interest in Bypassing the Commission on the Issue as to Reasonableness of Past Rates.

There is nothing in the record to suggest that the petitioner desired to avoid the Power Commission. Confronted with the decision of the Fourth Circuit in the *Hope* case, the legislative history of the Power Act, the fact that this Court in the *Hope* case had not decided the question of the Commission's power over reasonableness of past rates, and the fact that the Commission itself had repeatedly denied its authority (see, *Mississippi Power and Light Co. v. Memphis Natural Gas Co.*, 162 F. (2d) 388), and the state of the law generally, it was forced to make a decision on the proper interpretation of the Power Act, and on the course to be followed. We believe its decision was right. If the petitioner had applied to the Commission for findings as to the reasonableness of past rates, and the Commission had accepted jurisdiction and made findings, and those findings had been presented to the District Court to control its judgment as the only evidence required or permitted on the question of fact, it would now be confronted with the claim that the Commission was without authority to make the findings and the judgment should be for the defendant because of failure of proof.

The Senate Committee on Interstate Commerce, when striking from the bill for the Power Act all

provisions giving the Commission power to award reparations or to make findings as a prelude to judicial recovery of unreasonable charges paid in the past, assumed that as the bill related only to transactions at wholesale and only utility corporations were affected, such concerns, well informed and equipped to do so, could and would object to proposed rates promptly after their filing and before they took effect, and in that way avoid the necessity of providing for reparations. The Committee's assumption was sound enough as to cases where a corporation threatened by proposed unreasonable rates is a *free agent* and is not deterred for one reason or another from promptly applying for preventive relief.

In such a case it might well be concluded that if a corporation chooses not to complain to the Power Commission before the rates become effective and waits until they have been in force, it has waived the preventive remedy under Section 824d(e) and is thus limited to asking for an order fixing reasonable rates for the future under Section 824e. See, *Mississippi Power and Light Co. v. Memphis Natural Gas Co.*, 162 F. (2d) 388. There the action involved a claim for unreasonable charges in the past. During the pendency of the action Mississippi on April 11, 1945, filed with the Power Commission a complaint asking it to determine "the just and reasonable rate for gas delivered at the City gate by Memphis to Mississippi between June 21, 1938, and July 26, 1943, fixing the same by order." The Commission held it was without authority to grant the relief requested because of want of power, with the added ground that the complainant had failed to ask for preventive relief when the schedule was filed. Experience has shown that the committee's assumption has not been justified.

and the Power Commission thinks it should have powers similar to those of the Interstate Commerce Commission to consider the reasonableness of past rates and award reparations, or at least have primary jurisdiction to make findings binding on the courts in actions to recover for past transactions.

When the petitioner in 1946 applied to the Commission to alter the rates for the future, there was no good reason why it should not also have asked for reparations for the past if the Power Act provided for that. A trial of the issue of reasonableness of rates in court is a more difficult undertaking than one before a commission. We do not disagree with the Commission as to the propriety of granting it power so that the question of reasonableness of rates, past or present, should be tried before administrative commissions rather than courts. One reason for vesting in a single administrative commission primary jurisdiction over the issue of reasonableness of rates is to establish uniformity and prevent discrimination. See, *Great Northern Railway v. Merchants Elevator Co.*, 259 U. S. 285. That reason is of minor importance here, where the statute only applies to wholesale transactions and few persons are involved. The other reason for the administrative jurisdiction is to relieve the courts of the burden of dealing with the question of reasonable rates. The petitioner had no reason to object to that if the Power Act had offered an administrative remedy.

Our complaint about the Commission would be that, wanting those powers, it should have applied to Congress for an amendment to the statute instead of trying to gain those powers by straining the statute

beyond the breaking point, in the course of which it has twice shifted its position. If the decision below stands the petitioner will be left at this date without any remedy. An interpretation of the Power Act having that result should not be accepted if it may be avoided. *Ubi jus ibi remedium.* *Texas & Pacific Railway Co. v. Rigsby*, 241 U. S. 33.

The writ should issue.

Respectfully submitted,

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APPENDIX.

Cleveland and Akron v. Hope Natural Gas Co., 44
Pub. Utilities Rep. (New Series) pp. 34-35.

*** * * Originally the city of Cleveland requested this Commission to find the lawful Hope-East Ohio rates since June 21, 1938, but it now represents that the subject is idle for rates prior to June 30, 1939, because those rates which Cleveland consumers were obligated to pay East Ohio have been settled. The Commission does not have the authority to fix rates for the past and to award reparations. But Congress did empower and instruct the Commission in § 5(a) of the Natural Gas Act, 15 USCA § 717d(a), to fix future rates, and as a step in that process we must necessarily consider the reasonableness of past and existing rates. When the issue is raised and the public interest will be served, we consider as a necessary part of that duty the power to examine the entire rate problem involved and to determine what rates were lawful in the past. Also, § 14(a) of the act, 15 USCA § 717m(a), authorizes the Commission to investigate any facts which it finds necessary in order to determine whether Hope has violated any provision of the Natural Gas Act. Furthermore, the Commission has power to perform any act, pursuant to § 16, 15 USCA § 717o, which is necessary or appropriate to carry out the provisions of the act. Under § 4(a) of the Act, 15 USCA § 717c(a), any interstate wholesale rate that is not just and reasonable is unlawful. *Federal Power Commission v. Natural Gas Pipeline Co.* *supra* [(1942) 315 U. S. 575, 86 L. ed. , 42 PUR(NS) 129, 62 S. Ct 736] Hope's

rate collected from East Ohio Gas Company was lawful after June 21, 1938, the effective date of the act, only to the extent that it was just and reasonable. The city of Cleveland states that the Ohio Commission is investigating the reasonableness of the East Ohio Gas Company's bonded retail rates in Cleveland for the period since June 30, 1939, and that the lawfulness of Hope's rate is an important factor in the case. Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies.

In response to the request of the city of Cleveland, the Commission will make the appropriate findings of fact as to the lawfulness of the rates charged East Ohio by Hope since June 30, 1939. The Interstate Commerce Commission has furnished precedents for the performance of this public duty. Congress intended that this Commission cooperate with state Commissions and municipalities, and the provisions of §§ 5(b) and 17 are special evidence of such intent."